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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(HONORABLE JANIS L. SAMMARTINO)

UNITED STATES OF AMERICA,	)	Case: 08cr1763-JLS
	)	
Plaintiff,	)	Date: July 11, 2008
	)	Time: 2:00 p.m.
v.	)	
	)	**NOTICE OF MOTIONS AND**
SHEHADEH SAMIRA,	)	**MOTIONS TO:**
	)	(1) COMPEL DISCOVERY and
	)	PRESERVE EVIDENCE;
	)	(2) ORDER BILL OF PARTICULARS;
Defendant.	)	(3) GRANT LEAVE TO FILE
	)	FURTHER MOTIONS

TO: KAREN HEWITT, UNITED STATES ATTORNEY, and
CAROLINE HAN, ASSISTANT UNITED STATES ATTORNEY

PLEASE TAKE NOTICE that on July 11, 2008 at 2:00 p.m. or as soon thereafter as counsel may be heard, defendant, Shehadeh Samira, by and through his attorney, Andrew K. Nietor, will ask this Court to enter an order granting the following motions.

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MOTIONS

Defendant, Shehadeh Samira, by and through his attorney Andrew K. Nietor asks this Court pursuant to the United States Constitution, the Federal Rules of Criminal Procedure, and all other applicable statutes, case law, and local rules for an order to:

(1) Compel Discovery and Preserve Evidence;

(2) Compel Government to Provide a Bill of Particulars; and

(3) Grant Leave to File Further Motions.

These motions are based upon the instant motions and notice of motions, the attached statement of facts and memorandum of points and authorities, the files and records in the above-captioned matter, and any and all other materials that may come to this Court's attention prior to or during the hearing of these motions.

Respectfully submitted,

/s/ Andrew Nietor

Dated: June 27, 2008

ANDREW K. NIETOR
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Attorneys for Mr. Samira

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(HONORABLE JANIS L. SAMMARTINO)

UNITED STATES OF AMERICA, Plaintiff, v. SHEHADEH SAMIRA, Defendant.	)	Case: 08CR1763-JLS Date: July 11, 2008 Time: 2:00 p.m. **STATEMENT OF FACTS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTIONS**

I.

STATEMENT OF FACTS

Mr. Samira has been charged in an indictment with Naturalization Fraud, Procuring Naturalization by Fraud and Visa Fraud in violation of 18 U.S.C. §§ 1015(a), 1425(a) and 1546(a). The indictment does not specify the nature of the fraud beyond an allegation that he "provided a false answer to question 23 of his Application for Naturalization (N-400)." Question 23 of the N-400 asks "Have you ever given false or misleading information to any U.S. government official while applying for any immigration benefit or to prevent deportation, exclusion or removal?"

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II.

MOTION TO COMPEL DISCOVERY AND PRESERVE EVIDENCE

Mr. Samira moves for the production by the government of the following discovery and for the preservation of evidence. This request is not limited to those items that the prosecutor knows of, but rather includes all discovery listed below that is in the custody, control, care, or knowledge of any government agency. See generally Kyles v. Whitley, 514 U.S. 419 (1995); United States v. Bryan, 868 F.2d 1032 (9th Cir. 1989).

(1) The Defendant's Statements. The government must disclose to the defendant all copies of any written or recorded statements made by the defendant; the substance of any statements made by the defendant which the government intends to offer in evidence at trial; any response by the defendant to interrogation; the substance of any oral statements which the government intends to introduce at trial and any written summaries of the defendant's oral statements contained in the handwritten notes of the government agent; any response to any Miranda warnings which may have been given to the defendant; as well as any other statements by the defendant. Fed. R. Crim. P. 16(a)(1)(A). The Advisory Committee Notes and the 1991 amendments to Rule 16 make clear that the Government must reveal all the defendant's statements, whether oral or written, regardless of whether the government intends to make any use of those statements.

(2) Arrest Reports, Notes and Dispatch Tapes. The defendant also specifically requests the government to turn over all arrest reports, notes, dispatch or any other tapes, and TECS records that relate to the circumstances surrounding his arrest or any questioning. This request includes, but is not limited to, any rough notes, records, reports, transcripts or other documents in which statements of the defendant or any other discoverable material is contained. Such material is discoverable under Fed. R. Crim. P. 16(a)(1)(A) and Brady v. Maryland, 373 U.S. 83 (1963). The government must produce arrest reports, investigators' notes, memos from arresting officers, dispatch and other tapes, sworn statements, and prosecution reports pertaining to the defendant and his arrest. See Fed. R. Crim. P. 16(a)(1)(B) and (C), Fed. R. Crim. P. 26.2 and 12(I).

(3) Brady Material. The defendant requests all documents, statements, agents' reports, and tangible evidence favorable to the defendant on the issue of guilt and/or which affects the credibility of the government's case. Under Brady, impeachment as well as exculpatory evidence falls within the definition of evidence favorable to the accused. United States v. Bagley, 473 U.S. 667 (1985); United States v. Agurs, 427 U.S. 97 (1976).

Specifically, Mr. Samira requests statements, including Grand Jury transcripts, related to Michelle Correa, Mr. Samira's ex-wife. Defense counsel has been advised by Ms. Correa's attorney that she provided exonerating testimony before the Grand Jury, stating under oath that her marriage to Mr. Samira was legitimate and entered into in good faith and with no fraudulent intent.

(4) Any Information That May Result in a Lower Sentence Under The Guidelines. The government must produce this information under Brady v. Maryland, 373 U.S. 83 (1963). This request includes any cooperation or attempted cooperation by the defendant as well as any information that could affect any base offense level or specific offense characteristic under Chapter Two of the Guidelines. The defendant also requests any information relevant to a Chapter Three adjustment, a determination of the defendant's criminal history, and information relevant to any other application of the Guidelines.

(5) The Defendant's Prior Record. The defendant requests disclosure of his prior record. Fed. R. Crim. P. 16(a)(1)(B).

(6) Any Proposed 404(b) Evidence. The government must produce evidence of prior similar acts under Fed. R. Crim. P. 16(a)(1)(C) and Fed. R. Evid. 404(b) and 609. In addition, under Fed. R. Evid. 404(b), "upon request of the accused, the prosecution . . . shall provide reasonable notice in advance of trial . . . of the general nature" of any evidence the government proposes to introduce under Fed. R. Evid. 404(b) at trial. The defendant requests such notice sufficiently in advance of trial in order to give the defense time to adequately investigate and prepare for trial.

(7) Evidence Seized. The defendant requests production of evidence seized as a result of

any search, either warrantless or with a warrant. Fed. R. Crim. P. 16(a)(1)(C).

(8) Request for Preservation of Evidence. The defendant specifically requests the preservation of all tapes, documents or any other physical evidence that may be destroyed, lost, or otherwise put out of the possession, custody, or care of the government and which relate to the arrest or the events leading to the arrest in this case. This request includes, but is not limited to, the results of any fingerprint analysis, the defendant's personal effects, and any evidence seized from the defendant or any third party.

(9) Tangible Objects. The defendant requests the opportunity to inspect and copy as well as test, if necessary, all other documents and tangible objects, including photographs, books, papers, documents, fingerprint analyses, vehicles, or copies of portions thereof, which are material to the defense or intended for use in the government's case-in-chief or were obtained from or belong to the defendant. Fed. R. Crim. P. 16(a)(1)(C).

(10) Expert Witnesses. The defendant requests the name, qualifications, and a written summary of the testimony of any person that the government intends to call as an expert witness during its case in chief. Fed. R. Crim. P. 16(a)(1)(E).

(11) Evidence of Bias or Motive to Lie. The defendant requests any evidence that any prospective government witness is biased or prejudiced against the defendant, or has a motive to falsify or distort his or her testimony.

(12) Impeachment Evidence. The defendant requests any evidence that any prospective government witness has engaged in any criminal act whether or not resulting in a conviction and whether any witness has made a statement favorable to the defendant. See Fed. R. Evid. 608, 609 and 613; Brady v. Maryland. In addition, Mr. Samira requests that the Assistant United States Attorney assigned to this case oversee a review of all personnel files of each agent involved in the present case for impeachment material. Kyles v. Whitley, 115 S. Ct. 1555 (1995); United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991); but see United States v. Herring, 83 F.3d 1120 (9th Cir. 1996).

(13) Evidence of Criminal Investigation of Any Government Witness. The defendant

requests any evidence that any prospective witness is under investigation by federal, state or local authorities for any criminal conduct.

(14) Evidence Affecting Perception, Recollection, Ability to Communicate, or Truth Telling. The defense requests any evidence, including any medical or psychiatric report or evaluation, that tends to show that any prospective witness' ability to perceive, remember, communicate, or tell the truth is impaired, and any evidence that a witness has ever used narcotics or other controlled substance, or has ever been an alcoholic.

(15) Witness Addresses. The defendant requests the name and last known address of each prospective government witness. The defendant also requests the name and last known address of every witness to the crime or crimes charged (or any of the overt acts committed in furtherance thereof) who will not be called as a government witness.

(16) Name of Witnesses Favorable to the Defendant. The defendant requests the name of any witness who made an arguably favorable statement concerning the defendant or who could not identify him or who was unsure of his identity, or participation in the crime charged.

(17) Statements Relevant to the Defense. The defendant requests disclosure of any statement relevant to any possible defense or contention that he might assert.

(18) Jencks Act Material. The defendant requests production in advance of trial of all material, including dispatch tapes, which the government must produce pursuant to the Jencks Act, 18 U.S.C. § 3500. Advance production will avoid the possibility of delay at the request of defendant to investigate the Jencks material. A verbal acknowledgment that "rough" notes constitute an accurate account of the witness' interview is sufficient for the report or notes to qualify as a statement under section 3500(e)(1). Campbell v. United States, 373 U.S. 487, 490-92 (1963). In United States v. Boshell, 952 F.2d 1101 (9th Cir. 1991) the Ninth Circuit held that when an agent goes over interview notes with the subject of the interview the notes are then subject to the Jencks Act.

(19) Giglio Information. Pursuant to Giglio v. United States, 405 U.S. 150 (1972), the defendant requests all statements and/or promises, express or implied, made to any government

witnesses, in exchange for their testimony in this case, and all other information which could arguably be used for the impeachment of any government witnesses.

(20) Agreements Between the Government and Witnesses. The defendant requests discovery regarding any express or implicit promise, understanding, offer of immunity, of past, present, or future compensation, or any other kind of agreement or understanding, including any implicit understanding relating to criminal or civil income tax, forfeiture or fine liability, between any prospective government witness and the government (federal, state and/or local). This request also includes any discussion with a potential witness about or advice concerning any contemplated prosecution, or any possible plea bargain, even if no bargain was made, or the advice not followed.

(21) Informants and Cooperating Witnesses. The defendant requests disclosure of the names and addresses of all informants or cooperating witnesses used or to be used in this case, and in particular, disclosure of any informant who was a percipient witness in this case or otherwise participated in the crime charged against Mr. Samira. The government must disclose the informant's identity and location, as well as disclose the existence of any other percipient witness unknown or unknowable to the defense. Roviaro v. United States, 353 U.S. 52, 61-62 (1957). The government must disclose any information derived from informants which exculpates or tends to exculpate the defendant.

(22) Bias by Informants or Cooperating Witnesses. The defendant requests disclosure of any information indicating bias on the part of any informant or cooperating witness. Giglio v. United States, 405 U.S. 150 (1972). Such information would include what, if any, inducements, favors, payments or threats were made to the witness to secure cooperation with the authorities.

(23) Immigration/A-File Records. The defendant requests any and all records referring or relating to Mr. Samira's immigration history including, but no limited to, his A-file.

(24) Residual Request. Mr. Samira intends by this discovery motion to invoke his rights to discovery to the fullest extent possible under the Federal Rules of Criminal Procedure and the Constitution and laws of the United States. Mr. Samira requests that the government provide

him and his attorney with the above requested material sufficiently in advance of trial to avoid unnecessary delay prior to cross-examination.

III.

MOTION TO COMPEL THE GOVERNMENT TO PROVIDE A BILL OF PARTICULARS

Mr. Samira moves this Court to direct the government to file a bill of particulars. See Fed. Rule Crim. Pro. 7(f). A bill of particulars is warranted where it will enable adequate preparation of the defense and prevent surprise at trial. United States v. Giese, 597 F.2d 1170, 1180 (9th Cir. 1979). A bill of particulars provides a defendant with the details of the charges necessary to present a defense, to avoid prejudicial surprise at trial, and to protect against a second prosecution based upon the same facts. See United States v. Cecil, 608 F.2d 1294, 1296 (9th Cir. 1979)(noting also that a bill of particulars ensures that the defendant is tried on the basis of facts presented to a grand jury). Mr. Samira has rights under the Fifth and Sixth Amendments and Fed.R.Crim.P. 7(f) to notice of the charges against him and a fair trial with an opportunity to defend himself against the charges. In addition, a bill of particulars guarantees a defendant's Fifth Amendment right to be tried on a charge found by a Grand Jury, as a defendant is entitled to know the Government's theory as to a particular count. See Yeargain v. United States, 314 F.2d 881, 882 (9th Cir. 1963). This is even true where the indictment states all the ingredients of the offense. Myers v. United States, 15 F.2d 977, 983 (8th Cir. 1926) ("The office of a bill of particulars attaches without distinction, where the indictment states all the ingredients of the offense and further detail may be required or demanded for the protection of the defendant"). See also United States v. Thompson, 189 F. 838, 839 (W.D.Va. 1911)("An indictment may be so expressed as to be good on demurrer and which still does not give the defendant all the information which he should in fairness have in order to properly prepare for trial, and in such case the defects in the indictment, in Federal practice, may be overcome by a bill of particulars"). Mr. Samira has no idea how the government will prove the elements of the fraud charges alleged in the indictment. Nothing in the indictment provides sufficient notice. The indictment does not specify the nature of the fraud beyond an allegation that he "provided a false answer to question 23 of his Application for Naturalization (N-400)." Question 23 of the N-400 asks "Have you ever given false or misleading information to any U.S. government official while applying for any immigration benefit or to prevent deportation, exclusion or removal?" Accordingly, for preparation and notice, Mr. Samira moves this court to order the government to produce a bill of particulars explaining it's theory of liability on these counts.

IV.

REQUEST FOR LEAVE TO FILE FURTHER MOTIONS

To date, Mr. Samira and defense counsel have received 308 pages of discovery from the government. There is considerable additional discovery anticipated, including the A-file. Therefore, it is requested that defense counsel be allowed the opportunity to file further motions based upon information gained through the discovery process.

V.

CONCLUSION

For the foregoing reasons, Mr. Samira respectfully requests that the Court grant the above motions.

Respectfully submitted,

/s/ Andrew Nietor

Dated: June 27, 2008

ANDREW K. NIETOR
Attorneys for Mr. Samira

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(HONORABLE JANIS L. SAMMARTINO)

UNITED STATES OF AMERICA, Plaintiff, v. SHEHADEH SAMIRA, Defendant.	)	CASE NO. 08CR1763-JLS PROOF OF SERVICE

I, the undersigned, declare:

That I served the within Defendant's Notice of Motions and Motions to the United States Attorney's Office through this district's CM/ECF system.

I certify that the foregoing is true and correct. Executed on June 27, 2008 at San Diego, California.

/s/ Andrew Nietor
ANDREW K. NIETOR